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No. 455

SEP 13
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM—1930.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased (Petitioners below),

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE (Respondent below),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HERMAN GOLDMAN,
ELKAN TURK,
MILTON J. LEVITT,
Counsel for Petitioners.

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SUBJECT INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1

BRIEF IN SUPPORT OF PETITION 9

Statement 9
Statement of the Case 10
Specification of Errors 11
Summary of Argument 12
Argument 14

POINT I—If the amount assessed against Phillips be not a tax, then the summary provisions of Section 280 violate the due process clause of the Fifth Amendment 14

POINT II—If the amount assessed against Phillips be not a tax, then the provisions of Section 280 of the Revenue Act of 1926 violate the constitutional principle of the separation of powers 17

POINT III—If the amount assessed against Phillips be a tax, then the imposition thereof was beyond the constitutional powers of the Congress 20

POINT IV—If Section 280 of the Revenue Act of 1926 is constitutional, a transferee stockholder of a corporation in liquidation should not be required to pay a proportion of the tax greater than the proportion of the property of the corporation which he received 22

PAGE

CONCLUSION—The petitioners therefore submit that this is a proper case for the issue of a writ of certiorari 23

APPENDIX A—§280 Revenue Act 1926 (26 U. S. C. A. 1069). Transferees and fiduciaries; liability same as in case of deficiency in tax; limitations for assessment; pending suits..... 25

APPENDIX B—26 U. S. C. A. §1226. Courts vested with jurisdiction; review; powers of reviewing court 27

APPENDIX C—28 U. S. C. A. §347 (Judicial Code, Section 240, amended). Certiorari to the circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed..... 27

AUTHORITIES CITED:

PAGE

Commonwealth v. *Alderman*, 275 Pa. 483..... 21

Felland v. *Wilkenson*, 33 Fed. 2d 961 (U. S. D. C., W. D. Wisc.)..... 19

Hampton & Co. v. *U. S.*, 276 U. S. 394, 406..... 18

Meyers v. *U. S.*, 272 U. S. 52..... 18

Mid-Continent Petroleum Corporation v. *Alexander*, 35 Fed. 2d 43, 46 (U. S. D. C., W. D. Okla.).. 19

Murray's Lessee et al. v. *Hoboken Land & Improvement Co.*, 59 U. S. (18 How.) 272.....16, 18

Opinion of Justices, 239 Mass. 606 21

Owensboro Ditcher & Grader Co. v. *Lucas*, 18 Fed. 2d 798, 801 (U. S. D. C., W. D. Ky.).....14, 19

Pollack v. *Farmers Loan & Trust Co.*, 157 U. S. 429.. 20

Santee Mills v. *Query*, 122 S. C. 158..... 21

Springer v. *Government of the Philippine Islands*, 277 U. S. 189..... 18

U. S. v. *Armstrong*, 26 Fed. (2d) 227 (C. C. A., 8).. 23

U. S. v. *Garcin et al.* (decided by the District Court for the Southern District of New York, January, 1928, not reported in the official reports, but reported at page 7804 of the 1930 Federal Courts Volume of the Commerce Clearing House).... 22

U. S. v. *Snook*, 24 Fed. (2d) 844..... 23

U. S. v. *Updike*, 281 U. S. 489, 494..... 21

Updike v. *U. S.*, 8 Fed. (2d) 913..... 23

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OCTOBER TERM—1930.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased (Petitioners below),

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE (Respondent below),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Annie G. Phillips, Arthur L. Phillips, Seymour Phillips and Abraham S. Phillips, Executors of the Estate of I. L. Phillips, deceased, alleges and respectfully shows to this Honorable Court:

The proceeding which this petition seeks to review is a determination by the Circuit Court of Appeals for the Second Circuit, affirming an order of the United States Board of Tax Appeals, which in turn affirmed a determination by the Commissioner of Internal Revenue, whereby there was assessed against I. L. Phillips deficiencies of $277.75 and $9,124.68 for the years 1918 and 1919, respectively, in the Federal Income and Profits

Taxes of the Coombe Garment Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania.

The proceeding involved the constitutionality of Section 280 of the Revenue Act of 1926, quoted in the appendix to the accompanying brief, and, if the act be constitutional, the extent of the liability thereunder of the stockholder of the corporation who received part, but not all, of the assets of the corporation upon dissolution.

The facts were stipulated between the parties:

The Coombe Garment Company, a Pennsylvania corporation having its principal place of business in Philadelphia, filed its income and profits tax return for the calendar year 1918 on June 16, 1919, and its return for the year 1919 on March 6, 1920.

On September 27, 1919, the Coombe Garment Company, having legally dissolved, made distribution to its stockholders of a liquidating dividend. On that date, the total outstanding capital stock was five hundred shares of a par value of $100 each, of which I. L. Phillips owned 25 per cent., the remaining 75 per cent. being owned in varying amounts by eleven other stockholders. The entire liquidating dividend aggregated $68,558.35, of which Mr. Phillips' *pro rata* share was $17,139.61.

In February, 1925, the Commissioner of Internal Revenue assessed against the corporation an additional tax of $277.75 for the year 1918, and in December, 1924, an additional tax of $9,124.68 for the year 1919. Of the additional tax assessed against the corporation for the year 1918, there has been paid the sum of $96.07, leaving the sum of $9,306.36 due as additional taxes upon the income of the corporation for the years 1918 and 1919,

and your petitioners do not draw this amount into question in this proceeding.

On June 16, 1926, the Commissioner of Internal Revenue mailed to I. L. Phillips at New York City a notice to the effect that pursuant to the provisions of Section 280 of the Revenue Act of 1926, the liability of Mr. Phillips for the unpaid tax of the Coombe Garment Company had been assessed in the sum of $9,306.36, which is the entire amount of the company's unpaid taxes for the years 1918 and 1919. The Commissioner did not assess the balance of this tax, or any part of it, against any other former stockholders of the Coombe Garment Company, nor was any effort made by the Internal Revenue authorities to collect any part of this deficiency from any of the other stockholders.

The questions which the petitioners desire this Court to pass upon, are the following:

1. Does Section 280 of the Revenue Act of 1926 violate the constitutional principle of the separation of powers, in that it embodies a delegation of judicial power to the Commissioner of Internal Revenue, an executive officer?

2. Does Section 280 of the Revenue Act of 1926 violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States, in that it authorizes the officers of the Bureau of Internal Revenue to make summary assessment and collection of legal and equitable liabilities?

3. If the summary procedure with respect to such liabilities may be justified by the conclusion that the amount assessed is a tax, then is not the tax unconstitutional because

(a) it is not based upon income of the taxpayer; and

(b) it is not apportioned among the several States according to their respective numbers?

4. If the amount thus assessed is to be treated as a tax based upon income of the original taxpayer, and for that reason need not be apportioned among the several States according to their respective numbers by reason of the Sixteenth Amendment of the Constitution, is not the tax nevertheless unconstitutional for the reason

(a) that it is not uniform throughout the United States and

(b) that the determination of the amount of the assessment is delegated by the Congress to the legislatures of the several States.

5. Is it competent for Congress to authorize a tax based upon an income which is neither

(a) apportioned among the several States according to their respective numbers; nor

(b) uniform throughout the United States?

6. If the procedure authorized in Section 280 of the Revenue Act of 1926 is constitutional, does it justify the seizure of the entire amount of the tax involved from a single transferee, or must it be apportioned among all transferees similarly situated in accordance with the amounts of the property transferred to them respectively?

Questions 4 and 5 above set forth are predicated upon the rule of the conflict of laws that the liability of stockholders of a corporation in dissolution must be determined by the law of the State of incorporation. Thus there are forty-eight rules for determining the liability at law or in equity of such a stockholder, and forty-eight measures of the amount which the Commissioner is authorized to assess.

The importance of these questions from the standpoint of both the taxpayers and the Government, is at once apparent, and the decision of these questions is bound to have a far-reaching result. If it should be determined that the amounts thus assessed are taxes, and that they need neither be uniform throughout the land, nor apportioned among the several States according to their numbers, then it would seem to follow that the result of the Sixteenth Amendment has been to permit an income tax which might apply one rate to one State or one portion of the nation, and another rate to another State or other portions of the nation. If it should be held that the amount due is not a tax, but rather a mere liability owing to the Government by reason of the receipt of property from a taxpayer, then if the procedure provided for in Section 280 of the Revenue Act of 1926 is justifiable under the Constitution, there would seem to be no reason why, with equal appropriateness, the Government might not be justified in adjusting every claim of a civil nature which it has against any person by a seizure of his property, leaving it to him thereafter to have his rights adjudicated in an action based upon the illegality of the seizure. It is of the utmost moment that the limits upon such summary seizure be promptly and definitely set, and no tribunal other than this Honorable Court can accomplish that purpose.

As shown in the accompanying brief, District Courts in Circuits other than the second, have held the law unconstitutional.

With regard to Question No. 6 also there has been judicial conflict. As above noted, the liability at law or in equity of the transferee in the case of a corporate dissolution would depend, strictly speaking, upon the law of the State of incorporation, and it must be admit-

ted that in some of the States the transferee stockholder might be legally liable for the entire amount of the tax in a proper action brought. Nonetheless, in all of the cases in the District Courts in which this question arose, and in which the Government sought to enforce the liability at law or in equity of the transferee stockholder by suit rather than by summary process, the District Courts and the Circuit Court of Appeals for the Eighth Circuit have held each stockholder only for his *pro rata* share of the tax. This holding has proceeded upon the ground that the Equity Rules require the courts of the United States to render such judgment as will be equitable to the actual defendants if all of the proper defendants are not brought before the Court.

It is to be noted that the Court below reached the conclusion that I. L. Phillips was liable for the entire amount of the tax upon the authority of a case decided in the courts of the State of New York in which the liability of a stockholder of a New Jersey corporation was at issue.

It is submitted that no different rule should apply where the liability in equity is assessed by the Commissioner of Internal Revenue, than would apply had the Commissioner proceeded in accordance with the usual course, by suit in the Federal Court of Equity.

Petitioners believe that none of the questions above propounded have been involved in any case brought before this Honorable Court.

Petitioners respectfully present herewith their brief in support of this petition.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Circuit Court of

Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court: "Annie G. Phillips, Arthur L. Phillips, Seymour Phillips and Abraham S. Phillips, Executors of the Estate of I. L. Phillips, deceased, Appellants, against Commissioner of Internal Revenue, Appellee", to the end that said case may be reviewed and determined by this Court, as provided by law, and that your petitioners have such other and further relief and remedy in the premises as to this Court may seem just, and that said judgment of the Circuit Court of Appeals may be modified by this Honorable Court.

ANNIE G. PHILLIPS,
ARTHUR L. PHILLIPS,
SEYMOUR PHILLIPS and
ABRAHAM S. PHILLIPS,
As Executors of the Estate
of I. L. Phillips, Deceased,
By SEYMOUR PHILLIPS,
One of the Executors,
Petitioners.

ELKAN TURK,
Counsel for Petitioners.

State of New York,
County of New York—ss.:

SEYMOUR PHILLIPS, being duly sworn, deposes and says that he is one of the Executors of the Estate of I. L. Phillips, and is one of the petitioners herein; that he has read the foregoing petition, and the same is true as he verily believes.

SEYMOUR PHILLIPS.

Sworn to before me this
11th day of September, 1930.

JOHN S. QUINN,
Notary Public,
Kings County.
Clerk's No. 13, Register's No. 1007.
Certificate filed in New York County,
Clerk's No. 15, Register's No. 1211.
Certificate filed in Bronx County,
Clerk's No. 1, Register's No. 3101.
Certificate filed in Queens County,
Clerk's No. 319, Register's No. 6330.
Certificate filed in Nassau County.
Certificate filed in Suffolk County.
Commission expires March 30, 1931.

I hereby certify that I have read the foregoing petition and in my opinion is well founded and deserves the favorable consideration of this Court.

ELKAN TURK,
Counsel.

Supreme Court of the United States

OCTOBER TERM—1930.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased (Petitioners below),

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE (Respondent below),

Respondent.

BRIEF IN SUPPORT OF PETITION OF ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS AND ABRAHAM S. PHILLIPS, AS EXECUTORS OF THE ESTATE OF I. L. PHILLIPS, DECEASED, FOR A WRIT OF CERTIORARI.

Statement.

The opinion of the Circuit Court of Appeals, embodying the determination of which a review is here sought, was handed down on June 9, 1930, and it has not yet been published in the official reports. It appears, however, at page 8774 of the 1930 Federal Courts Volume of the Commerce Clearing House. The opinion of the Board of Tax Appeals appears at 15 B. T. A. 1218. The petitioners respectfully request the Court to take jurisdiction by certiorari under the provisions of Section 1003

of the Act of February 26, 1926, c. 27, Section 1003, 44 Stat. 110 (26 U. S. C. A. 1226) which in turn refers for procedure to Section 24A of the Judicial Code (28 U. S. C. A. 347). Both of these statutes are quoted in the appendix.

The basis of the petition is that important questions relating to the Revenue Laws of the United States, and the interpretation and constitutionality thereof, are involved, concerning many of which there has been conflicting opinion in the inferior courts, and none of which have been passed upon by this Court. The determination of the Court below appears to be in conflict with the determination reached on an analogous question in the Eighth Circuit.

Statement of the Case.

The facts appear in the stipulation of the parties (R. 70).

On September 27, 1919, the Coombe Garment Company, a Pennsylvania corporation having its principal place of business in Philadelphia, having legally dissolved, distributed its assets to twelve stockholders in liquidation (R. 71-75). On that date, the company had outstanding and issued capital stock amounting to fifty thousand dollars, which was represented by 500 shares, each having a par value of $100 (R. 71). Of the total outstanding capital stock of the company, I. L. Phillips owned approximately 25%, the remaining 75% being owned in varying amounts by the eleven other stockholders (R. 72-74). Mr. Phillips received the sum of $17,139.61, as his pro rata share of the entire liquidating dividend aggregating $68,558.35 (R. 72-74). In February, 1925, the Commissioner of Internal Revenue

assessed an additional tax against the Coombe Garment Company of $277.75 for the year 1918, and in December, 1924, an additional tax of $9,124.68 for the year 1919 (R. 74). Of the additional tax assessed against the corporation for the year 1918, the sum of $96.07 was paid, leaving the sum of $9,306.36 due as additional taxes upon the income of the corporation for the years 1918 and 1919 (R. 75).

Thereafter, and on June 16, 1926, I. L. Phillips, received notice of the assessment against him, as a single amount, of the sum of $9,306.36, which is the aggregate of the deficiencies for 1918 and 1919 assessed against the Coombe Garment Company (R. 75-76).

The Commissioner has not assessed this deficiency tax, or any part of it, against any other former stockholder of the Coombe Garment Company, nor has any effort been made by the Internal Revenue authorities to collect any part of this deficiency from any of the other stockholders (R. 78-79).

Specification of Errors.

Petitioners contend that the Court below erred:

(a) in holding that the summary procedure prescribed in Section 280 of the Revenue Act of 1926, constitutes due process of law;

(b) in holding that the delegation to the Commissioner of Internal Revenue of the power to determine the liability of a transferee at law or in equity, does not involve a violation of the constitutional principal of the separation of powers; and

(c) in holding that the summary procedure prescribed by Section 280 of the Revenue Act of

1926 could be justified by designating the amount to be collected from the transferee a tax, without at the same time holding that such tax, assessed and levied as provided for in Section 280, is without justification or warrant in either the First Article of the Constitution of the United States, or the Sixteenth Amendment of the Constitution of the United States.

Summary of Argument.

From petitioner's point of view, the Government with regard to Section 280 of the Revenue Act of 1926 (quoted in the appendix), must find itself impaled on either of the horns of a dilemma. Either the amount sought to be assessed is or it is not a tax. If it is not a tax, then it is an amount owing under the provisions of State laws by reason of the receipt of property from the taxpayer. In that case, no constitutional justification can be found for passing over the usual procedure for determining the exact quality and character of the transfer from the taxpayer, the incidents thereto, and all of the circumstances which should be determined by the orderly process of Court determination before the transferee's property is subject to seizure. The executive branch of the Government is not vested by the Constitution with the power to make such determinations. If, on the other hand, the amount sought to be collected is a tax, then authority therefor must be found in the Constitution. It certainly is not a tax based upon the income of him against whom collection is sought, and hence appears to be beyond the scope of the Sixteenth Amendment. If collection is not within the scope of the Sixteenth Amendment, then it should be either apportioned among the

several states, according to their respective numbers, as a direct tax and under Article I, Section 2, Clause 3 of the Constitution, should be uniform throughout the United States in accordance with Article I, Section 8, Clause 1 of the Constitution, as an excise or impost.

Of course there is no apportionment or pretense of apportionment, nor can there be geographical uniformity, for by the conflict of laws, the liability at law or in equity of a transferee of a corporation is dependent upon the law of the State of incorporation.

If it be said that the tax is an income tax because based upon the income not, it is true, of him against whom the assessment is made, but of his transferor, then even a more serious question of constitutionality arises, to wit: Has the Sixteenth Amendment, while taking income taxes out of the requirement for apportionment in accordance with population, also held it free from the requirement of uniformity, so that the Congress might levy an income tax at one rate against the residents of one state and at another rate against residents of other states?

In any event the amount of each assessment must depend on the laws of the State of incorporation which may be changed from time to time. Congress has thus delegated to State legislatures a part of its tax laying function.

If, in spite of the foregoing considerations, Section 280 be held constitutional, the proper amount of the liability remains to be considered. No general rule, that the transferee is liable for the entire amount of the tax against the transferor, can be justified in view of the principle of the conflict of laws involved. The rule applied by the Equity Courts of the United States, which have had the same principle before them, requires that each transferee should only be subjected to a levy in proportion to the property of the taxpayer received by him.

Argument.

POINT I.

If the amount assessed against Phillips be not a tax, then the summary provisions of Section 280 violate the due process clause of the Fifth Amendment.

The hypothesis here assumes that the amount assessed against Phillips is what the statute in plain language calls it, *i. e.*, a liability in law or in equity. In this connection we may properly contemplate the entire scope of Section 280 without limitation to the specific facts in the case at bar. Phillips was a transferee because he was a stockholder of the taxpayer corporation in dissolution. With like reason, however, might the section be used against one whom the Commissioner believes has taken the property of a taxpayer in fraud of his creditors. The operation of the section must inevitably involve determinations by the Commissioner of intricate questions of law and fact, such as the adequacy of a consideration paid, the intent of the parties in making and receiving the transfer, the existence of fraud. Since the liability thus determined may be one at law as well as in equity, the Commissioner would thus be in a position to substitute himself for both court and jury. The point here made is supported by the following language quoted from *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 Fed. (2d) 798 (U. S. D. C., W. D. Ky.):

> "Liabilities such as those herein enumerated are the liabilities referred to in section 280, and heretofore have always been enforced by judicial

proceedings. The matters involved are essentially judicial in character, and Congress is without power to withdraw them from judicial cognizance and confer them upon the executive department, and the attempt in section 280 so to do amounts not only to a denial of due process of law, but also is violative of section 1 of article 3 of the Constitution, which vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish."

That case arose before the Congress had adopted Section 604 of the Revenue Act of 1928, 26 U. S. C. A. 2604, which specifically prohibited a suit for an injunction to restrain the Collector from enforcing liabilities under Section 280. The Court held that the liabilities under Section 280 were not, in the absence of such legislation, within the meaning of Section 3224 of the Revised Statutes which prohibited an injunction against the collection of a tax. In this connection, the Court said:

"The liability of the taxpayer as such grows out of his relationship to the government. It is an enforced contribution imposed upon him or his property for the support of the government. It is not based upon any contract, nor is it the result of any voluntary obligation assumed by him. When the government undertakes to collect this liability, however, from a third party against whom it was not originally assessed, the liability arises from entirely different considerations. The liability of such a person is a contractual one, either express or implied. If he contracts with the taxpayer to pay the tax, the government's right to proceed against him is upon the theory that the contract was made for its benefit. If he receives prop-

> erty from the taxpayer without paying therefor, or under such conditions as in good conscience would require it to be devoted to paying the obligations of him from whom it was received, then the law implies a promise on his part to pay."

Indeed, if the Government can enforce in a summary manner such an indirect liability as that of a transferee, then there appears to be no reason why the Government should in any case be required to follow the orderly procedure of the Courts in collecting and enforcing any claim which it may have.

The Court below relied upon the case of *Murray's Lessee et al.* v. *Hoboken Land & Improvement Co.*, 59 U. S. (18 How.) 272. In that case, however, the summary remedy was exercised against a Collector of the Customs, a public officer, who must certainly have accepted his office so conditioned that the statutory remedies against him were a part of his contract of employment. The case of *Murray's Lessee* is notable for its learned examination of the history of summary procedure for the enforcement of liabilities to the government, both in England and in this country. The review of this history, as presented by Mr. Justice Curtis, would seem convincing that since the adoption of the Magna Charta, no such liability as that with which I. L. Phillips is here charged, could have been summarily enforced either in England or in this country.

POINT II.

If the amount assessed against Phillips be not a tax, then the provisions of Section 280 of the Revenue Act of 1926 violate the constitutional principle of the separation of powers.

Under this point again the hypothesis is that Phillips has been taxed merely because of his legal and equitable liability resulting from his receipt of moneys upon the liquidation of the Coombe Garment Company. The determination of the amount of that legal or equitable liability may well involve the decision of numerous questions of law and of fact. The distributee-stockholder may have setoffs and counterclaims against the liability. Indeed, he may claim to be a creditor of the corporation for an amount in excess of his distribution. All of these questions the Commissioner of Internal Revenue, is, by Section 280, authorized to adjudicate. This means that he must determine the questions of fact, and that he must interpret the corporation statutes of the forty-eight states, and must, in addition, decide every question between the corporation and the distributee-stockholder, which may involve other state statutes, *i. e.*, statutes of fraud, statutes of limitation and the like.

It does not help the matter that an appeal is allowed from the determination of the Commissioner to the Board of Tax Appeals (itself an administrative body) and to the Circuit Courts of Appeals. The fact still remains that the original judicial power is vested by the statute in a subordinate of the executive branch of the Government. Such violation of the principal of the separation of powers has always been condemned.

In *Murray's Lessee et al.* v. *Hoboken Land & Improvement Co.*, 59 U. S. (18 How.) 272, Mr. Justice Curtis, in commenting upon the division of the powers of government, said at page 284:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

This principle has never been departed from by this Court, and as recently as in *Springer* v. *Government of the Philippine Islands*, 277 U. S. 183, Mr. Justice Sutherland said at page 209:

> "And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism."

The Court is further respectfully referred to *Meyers* v. *U. S.*, 272 U. S. 52, and *Hampton & Co.* v. *U. S.*, 276 U. S. 394, 406.

More need not be said with regard to the complicated issues of law and fact which the Commissioner may have presented to him pursuant to the jurisdiction granted to him in the statute under consideration, to emphasize the utter dissimilarity between the judicial task imposed upon him in such legislation, and the functions performed by such administrative bodies and officers as the Interstate Commerce Commission, the Federal Trade Commission, the Commissioner of Immigration and the Commis-

sioner of Patents. These bodies and officers are substantially only fact-determining bodies and officers who have had the rule for the application of the facts supplied by the legislature. Certainly in none of their duties is there involved the determination of disputes between private individuals. On the other hand, the Commissioner of Internal Revenue may, under Section 280 of the Revenue Act of 1926, be called upon to determine the amount of indebtedness and liability as between transferor and transferee.

The matter has been decided in other Federal Courts in a manner directly opposite to the decision in the Court below.

In *Felland* v. *Wilkenson*, 33 Fed. 2d 961 (U. S. D. C., W. D. Wisc.), the Court said:

> "The cogent reasoning of Judge Dawson leading to his conclusion that section 280 of the Act of 1926 (26 U.S.C.A. section 1069), in so far as it assigns to administrative officers the power to determine the liability of a transferee of a taxpayer, is invalid as a grant of judicial power, seems well nigh inescapable."

In the following cases also has it been held that Section 280 violates the principle of separation of powers:

Mid-Continent Petroleum Corporation v. *Alexander*, 35 Fed. 2d 43, 46 (U. S. D. C., W. D. Okla.);

Owensboro Ditcher & Grader Co. v. *Lucas*, 18 Fed. 2d 798, 801 (U. S. D. C., W. D. Ky.).

POINT III.

If the amount assessed against Phillips be a tax, then the imposition thereof was beyond the constitutional powers of the Congress.

Three constitutional provisions apply to the power of Congress to levy and collect taxes.

Article I, Section 2, Clause 3 provides that direct taxes must be apportioned among the several states according to their respective numbers.

Article I, Section 8, Clause 1 provides that all duties, imposts and excises shall be uniform throughout the United States.

After the decision of this Court in *Pollack* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, in which it was determined that an income tax is a direct tax, the Sixteenth Amendment was adopted in which taxes upon incomes were authorized without the necessity for apportionment.

It seems unnecessary to argue at length that the assessment against Phillips was not based upon any income which he received. If it be a tax, it is therefore a direct tax, not based upon income and not apportioned among the States in accordance with their numbers. Certainly, it does not seem to be an excise or an impost; but if it be such, it cannot be sustained, for it is not uniform geographically throughout the United States, depending, as it does, upon the laws of the forty-eight separate states.

On the other hand, if, by any chance, it may be designated a tax upon income because based upon the income

of the distributing corporation, then a new constitutional question is presented which the petitioners believe has never been presented to this Court. This question follows: May the Congress levy a tax upon incomes which is neither apportioned among the several states in accordance with their numbers, nor uniform throughout the United States? The express language of the Sixteenth Amendment seems to go no further than to take income taxation out of the apportionment restriction originally imposed upon the power of Congress to lay direct taxes. It does not, in terms, subject the income tax to the constitutional limitation upon the power of Congress to lay imposts and excises, *i. e.*, it does not, in so many words, provide that income taxes must be uniform throughout the United States. Nonetheless, it is petitioners' position that such indeed is the intention and the effect of the Sixteenth Amendment. Petitioners' position is that the Sixteenth Amendment was not intended to enable, and cannot be given the effect of enabling the Congress to levy an income tax at one rate in New York and at another rate in California, and at varying rates throughout the land. Moreover since the legislatures of the several States may from time to time increase or decrease the transferees' liability in law or in equity, the legislation is invalid as delegating to the legislatures of the several States, powers confided by the Constitution exclusively to the Congress. Such delegation is invalid.

> Opinion of Justices, 239 Mass. 606;
> *Commonwealth* v. *Alderman*, 275 Pa. 483;
> *Santee Mills* v. *Query*, 122 S. C. 158.

We believe that under this point it is unnecessary to do more than to suggest the questions which we desire to argue fully if the certiorari herein be granted. That the point, however, has substance, is indicated by the language of this Court in *U. S.* v. *Updike*, 281 U. S. 489, 494.

POINT IV.

If Section 280 of the Revenue Act of 1926 is constitutional, a transferee stockholder of a corporation in liquidation should not be required to pay a proportion of the tax greater than the proportion of the property of the corporation which he received.

We have already indicated that pursuant to the law of the conflict of laws, the legal liability of a transferee-stockholder of a corporation in dissolution must be determined according to the laws of the state of incorporation. It is quite competent, however, for the Courts of the United States, sitting as courts of equity, to determine whether or not the amount to be collected should be the full amount which might be collected in an action at law in the courts of the state of incorporation. The question has not been submitted to this Court, but the Courts of inferior jurisdiction, to which the question has been presented, have, with the exception of the Court in the instant case, held that only a proportionate collection should be made.

In *U. S.* v. *Garcia et al.* (decided by the District Court for the Southern District of New York, January, 1928, not reported in the official reports, but reported at page 7804 of the 1930 Federal Courts Volume of the Commerce Clearing House), Judge Knox said:

> "Inasmuch, also, as the complainant has given no explanation of its failure to bring all of the stockholders of the company before the court, and it having been within the power of the Government to reach such stockholders, even though they

are non-residents of this district, I think the liability of such as are before me should be limited, as was done in *Wood* v. *Dummer, supra*. Therefore, the decree against them should be only for their contributory share of the tax, in the proportion which the stock held by them bore to the whole capital stock."

The following cases are among those which have upheld the principle here contended for:

U. S. v. *Armstrong*, 26 Fed. (2d) 227 (C. C. A., 8);
U. S. v. *Snook*, 24 Fed. (2d) 844;
Updike v. *U. S.*, 8 Fed. (2d) 913.

CONCLUSION.

The petitioners therefore submit that this is a proper case for the issue of a writ of certiorari.

Dated, New York, September 11, 1930.

Respectfully submitted,

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Appendix A.

§280 Revenue Act 1926 (26 U. S. C. A. 1069). Transferees and fiduciaries; liability same as in case of deficiency in tax; limitations for assessment; pending suits.

(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection and the provisions prohibiting claims and suits for refunds).

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter or by any prior income, excess-profits, or War-Profits Tax Act.

(2) The liability of a fiduciary under section 192 of Title 31 in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before February 26, 1926, but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after February 26, 1926.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the statute of limitations upon the assessment of a liability of a transferee or fiduciary shall, after the mailing of the notice under section 1048 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending February 26, 1926.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee and distributee (Feb. 26, 1926, c. 27, §280, 44 Stat. 61; May 29, 1928, 8:00 a.m. c. 852, §505 (a), 45 Stat. 870).

Appendix B.

26 U. S. C. A. §1226. Courts vested with jurisdiction; review; powers of reviewing court.

(a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the board (except as provided in section 346 of Title 28); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 347 of Title 28.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the board is not in accordance with law, to modify or reverse the decision of the board, with or without remanding the case for a rehearing, as justice may require. (Feb. 26, 1926, c. 27, §1003, 44 Stat. 110.)

Appendix C.

28 U. S. C. A. §347 (Judicial Code, Section 240, amended). Certiorari to the circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme

Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)